85-934

Supreme Court, U.S.
FILED
OCT 31 1985
JOSEPH F. SPANIOL, JR.
CLERK

No._____

IN THE SUPREME COURT OF THE
UNITED STATES
_____, 1985

WILLIAM B. SHOCKLEY,
Petitioner,

vs.

Cox Enterprises, Inc., and
Roger Witherspoon,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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_____, 1985.

QUESTIONS PRESENTED

I. THE JUDGMENT OF THE JURY IS INSUFFICIENT AND THE DAMAGES AWARDED THE PLAINTIFF HEREIN ARE INADEQUATE.

II. THE DISTRICT COURT ERRED IN DENYING CERTAIN REQUESTED CHARGES OF THE PLAINTIFF.

III. THE COURT ERRED WHEN IT PERMITTED THE DEFENDANT TO INTRODUCE DEFENDANT'S EXHIBIT "383" TO THE JURY OVER THE PLAINTIFF'S OBJECTION.

IV. THE LIBEL LAW ACHIEVES THE WORST OF TWO WORLDS: IT DOES LITTLE TO PROTECT REPUTATIONS AND MUCH TO DETER FREE SPEECH.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the Unites States.

W.B. Shockley, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the 11th Circuit entered in the above-entitled case on August 2, 1985.

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Appendix "A": - Copy of judgment in the United States Court of Appeals, Eleventh Circuit, Dated August 2, 1985.

Verdict of the jury in the United States District Court.

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PUBLIS

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 84-8814

D.C. Docket No. 81-1431

WILLIAM B. SHOCKLEY,

Plaintiff-Appellant,
Cross-Appellee,

versus

COX ENTERPRISES, INC. and
ROGER WITHERSPOON,

Defendants-Appellees,
Cross-Appellants.

Appeals from the United States District Court for the Northern District of Georgia

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(August 2, 1985)

Before VANCE and HENDERSON, Circuit Judges, and ALLGOOD,* District Judge.

PER CURIAM:

AFFIRMED. See Circuit Rule 25.

"Costs taxed equally against plaintiff-appellant/cross-appel and defendants-appellees/cross-appellants."

* Honorable Clarence W. Allgood, U. S. District Judge for the Northern District of Alabama, sitting by designa

Judgment Entered: August 2, 1985
For the Court: Spencer D. Mercer, Clerk

ISSUED AS MANDATE: AUG 28 1985 By: Deputy Clerk

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Eleventh Circuit is presented in Appendix A hereto, Infra, Page _____.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on August 2, 1985, and this Petition for Certiorari was filed herein 90 days of that date. This Court's jurisdiction is invoked under 28 USC Section 1254 (1). This is an application from a judgment obtained in jury trial in the United States District Court for the Northern District of Georgia, Atlanta Division.

STATUTE INVOLVED

The statute involved is 28 USC Sections 1254 through 1257.

STATEMENT

The jurisdiction of the District Court was invoked under 28 USC Section 1332 because of diversity of citizenship, the Plaintiff being a resident of California and the Defendant newspaper being published in Atlanta, Georgia, and the co-defendant being a resident of the state of Georgia.

Plaintiff seeks review of the judgment of the United States District Court for the Northern District of Georgia rendered in a jury trial as well as in the United States Court of Appeals for the Eleventh Circuit. The questions to be reviewed were raised by Plaintiff, by request to charge and exceptions, the trial court overruling each. The specific basis in the record where the matter appears:

Ruling on exceptions, Vol. VII, Page 94, Lines 20-25; Page 95 through Page 98 for position of the court's charge and exception thereto. All were timely and properly raised so as to give this court jurisdiction to review judgment on writ of certiorari.

STATEMENT OF THE CASE

This libel suit began on Thursday, July 31, 1980 in Atlanta, Georgia when the Atlanta Constitution published an article entitled "Designer Genes By Shockley", written by one of its employees, Roger Witherspoon, that libeled Dr. William Shockley.

After publication, Dr. Shockley requested a retraction. Said request was refused. Dr. Shockley then filed a lawsuit in the United States District Court for the Northern District of Georgia in Atlanta, Georgia seeking ONE MILLION TWO HUNDRED FIFTY THOUSAND

DOLLARS ($1,250,000.00).

Dr. Shockley took exception to almost the entire article and each and every paragraph therein. However, at trial he concentrated on the following:

1. Paragraph No. 28. "The Shockley Program was tried out in Germany during World War II when scientists under the direction of the government experimented on Jews and defectives in an effort to study genetic development.

2. Paragraph No. 34. "For Shockley, the German experiments weren't wrong per se - though they were not conducted in a humanitarian manner, but they chose the wrong people."

3. Paragraph No. 37. "That no one else can ascertain these things doesn't faze the amateur geneticist. The fact that geneticists, people who study the passage of traits for a living rather than a demagogic (sic) hobby - discounts

Shockley's theories as rubbish and insist that environment plays a major role in the development of measurable "intelligence" does not faze him either."

On September 6, 1984 in the United States District Court for the Northern District of Georgia, Atlanta Division, the trial began before Judge Robert L. Vining, Jr. and a jury. On September 14, 1984 the jury returned a verdict for the plaintiff in the amount of $1.00 and "the sum of no amount, nothing as to punitive damages. It is from that verdict and resulting judgment that the plaintiff appealed to the Eleventh Circuit.

REASONS FOR GRANTING THE WRIT

I. THE JUDGMENT OF THE JURY IS INSUFFICIENT AND THE DAMAGES AWARDED THE PLAINTIFF HEREIN ARE INADEQUATE.

The jury in this case awarded the Plaintiff the sum of $1.00 as damages.

However, the evidence substantially indicated that the Newspaper had acted with actual malice and that the Plaintiff herein being a public figure was entitled to punitive damages. Clear and convincing proof of actual malice in defaming Dr. Shockley was carefully established in the trial of this case and the jurors so found. Certainly, that is a constitutional prerequisite to an award of punitive damages. Actual malice in context of determining propriety of punitive damages in a defamation suit means knowledge that the defamatory statement was false or published with reckless disregard of whether it was false. (See New York Times, Inc. vs. Sullivan, 376 U.S. Page 279-280, 84 Supreme Court, Page 726). (Also, See Levine vs. C.M.P. Publications, Inc., 738 Fed. 2ed., 660, Page 674). There was massive amount of evidence that the

reporter, Mr. Witherspoon, not only had knowledge of the falsity of the statements made by him but that he also completely disregarded the information and directions that the Plaintiff provided him. Consequently, the proof was more than substantial that Mr. Witherspoon knew that the statements contained in the newspaper article were false and that Mr. Witherspoon was guilty of an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers. (See Butts 388 U.S. at 155, 87 Supreme Court, Page 1991). The record in this case is sufficient to sustain an award of punitive damages. Consequently, on the issue of punitive damages, damages which were in part based upon such libel must be returned to the District court for new trial. (See Litman vs. Massachusetts Mutual Life Insurance

Company, 739 Fed 2ed., 1549 at Page 1552 and 1562). It must be remembered that punitive damages are awarded upon a theory of punishment of penalty for outrageous conduc^ The statements attributed to Witherspoon and the Newspaper are clearly statements of fact. The writer knew the statement contained in paragraph 28 of the article (See page herein) was false and the newspaper knew that the statement was false or published it with reckless disregard of whether it was false or not. Dr. Shockley was clearly charged with crimes against all humanity. Of course, the Plaintiff contends that there were numerous other false statements in said Article and that the Newspaper published that falsity with the same reckless disregard as to whether it was false or not. The Plaintiff contends that the article was written in a manner so as to create in the minds of

the average reader that "the Shockley program was used in Nazi Germany" or that Shockley was some type of a Nazi. The Defendants' actual malice toward Dr. Shockley is manifested by their investigation, grossly inadequate under the circumstances, and by the publication of an article which contradicted the information given to them. Dr. Shockley has sustained substantial injury to his reputation and he has endured great mental pain, anguish, and suffering, all of which have left, as he testified, great permanent scars.

II. THE COURT ERRED IN ITS CHARGE TO THE JURY IN THAT THE COURT DID NOT CHARGE CERTAIN REQUESTED CHARGES SUBMITTED TO THE COURT.

The District Court denied to instruct the jury on several principles of law that were vital to the plaintiff's case, all of which followed the Eleventh Circuit case of Hunt vs. Liberty Lobby,

Case No. 82-5321 (November 28, 1983:

1. "Absent admission by the defendant that he knew his material was false or that he doubted its truth, a public figure in prosecuting a libel action must rely upon circumstantial evidence to prove his case." See Transcript of Proceedings, Vol. VII, pg. 96. This charge was requested by the plaintiff and denied by the court. Plaintiff excepted timely to the court's refusal to charge. A public figure must rely upon circumstantial evidence to prove his case. (See Herbert vs. Lando, 441 U.S. 153, 99 S.Ct. 1635).

2. "If you find that the defendants wrote and published defamatory statements and that these statements contradicted information known to them, you may infer actual malice on the part of the defendants." Hunt, supra, at 645. See Transcript, Vol. VII, pg. 97. This

charge was requested by the plaintiff and denied by the court. Plaintiff excepted timely to the court's refusal to charge.

3. "As members of the jury you must determine whether this publication was made in good faith by the defendants cannot automatically insure a favorable verdict. If you the jurors find that the allegations of the defendants contained in the article are so inherently impossible that only a reckless man would have put them into circulation, then you may find any profession of good faith to be unpersuasive." Hunt, supra, at 643. See Transcript, Vol. VII, pg. 96-97. This charge was requested by the plaintiff and denied by the court. Plaintiff excepted timely to the court's refusal to charge.

4. "A publisher cannot feign ignorance or profess good faith when there are clear indications present which

bring into question the truth or falsity of the statements." Hunt, supra, at 644; Fitzgerald vs. Penthouse, Int'l., Ltd., 691 F.2d. 666, 670. See Transcript, Vol. VII, pg. 97-98. This charge was requested by the plaintiff and denied by the court. In the charge, no reference was made to the standards ordinarily adhered to by responsible publisher.

The test of actual malice is not whether the defendant acted as a reasonable publisher would have acted under the circumstances; rather, the inquiry focuses on the defendant's state of mind at the time of publication. (See Long vs. Arsell, 618 F.2d 1145, 1147, 5th Circuit, 1980, Cert. denied 449 U.S. 1083, 101 S.Ct. 869.

Thus it is clear that the remand for a new trial is necessary as the error herein is so fundamental that the failure to recognize it will result in a

miscarriage of justice. (See Barnett vs. Atlanta Housing Authority, 707 F.2d 1571, 1580, Eleventh Circuit, 1983). The court's failure to charge the departure from the standards of investigating and reporting ordinarily adhered to by responsible publishers also was an error in that the jurors could have found that the article was false or had serious doubts about its truth. We have no way of knowing the premise of this judgment. The United States Supreme Court has repeatedly cautioned that the preservation of the freedom of the press requires public figures and public officials to prove subjective actual malice. (See Gertz vs. Welch, 418 U.S. 323, 94 S.Ct. 2997). Because we do not know whether the jury followed the constitutionally mandated criteria, a new trial will be necessary. (See Somer vs. Johnson, 704 F.2d 1473, 1478,

Eleventh Circuit, 1983: New trial is required when both proper and improper instructions given because jury could have followed the incorrect rule; further, see Johnson vs. Bryant, 671 F.2d 1276, 1281, Eleventh Circuit, 1982; further, see Time, Inc. vs. Hill, 385 U.S. 374, 87 S.Ct. 534, in which a new trial was mandated when the jury charges permitted recovery based upon, inter alia, the failure to make a reasonable investigation even though instructions arguably included the New York Times rule. (See head note no. 3)).

III. THE COURT ERRED WHEN IT PERMITTED DEFENDANT TO INTRODUCE DEFENDANT'S EXHIBIT "383" TO THE JURY OVER THE PLAINTIFF'S OBJECTION. (See Volume 6 of the Transcript of Proceedings, Page 140-141).

This was not an insignificant or insubstantial error. This article which was an article published from the Washington Post on September 12, 1984

during the trial of the case referring to certain statements made allegedly by the Plaintiff. The exhibit number "383" was entirely irrelevant and immaterial to the trial. The Court violated one of the cardinal and principal rules of any trial court in that almost always and without exception the court advises the jury not to read anything contained in the newspaper concerning the trial upon which they sit as a jury. Secondly, the court always instructs the jury not to listen to any television reports or discuss the case with any other person until the case had been submitted to the jury for its deliberations. Consequently, the Court herein simply permitted the Defendant to introduce a newspaper article which was completely irrelevant to the trial at hand. In addition to that very basic basic error which is substantial and which unquestionably influenced the

jury's decision as to the question of damages, the court also permitted the Defendant to go back into matters which had been previously covered on its early cross-examination. (See the Trial Transcripts of Proceedings, Volume 6, Page 143-144).

IV. THE LIBEL LAW ACHIEVES THE WORST OF TWO WORLDS: IT DOES LITTLE TO PROTECT REPUTATIONS AND MUCH TO DETER FREE SPEECH. Since the Supreme Court ruled in favor of The New York Times in New York Times vs. Sullivan in 1964, no country in the world has offered more legal protection for those wishing to speak out frankly and fearlessly. Yet today, American libel law manages to achieve the worst of two worlds: It does little to protect reputation. It does much to deter speech.

How much do victorious plaintiffs receive? More than half of all initial libel awards are over $100,000. Yet what

juries try to do and what appellate courts permit them to do have little in common. Before 1980, figures from the libel defense center show that only one judgment in American history amounted to more than $1 million; from 1980 through 1984, 20 such judgments have been awarded by trial judges and juries. But the appellate courts have yet to affirm a single one of these and the largest judgment affirmed by an appeals court has been for $400,000. However, on October 23, 1985, in an unpublished opinion, a California State Court of Appeal upheld awards of $1,520,000.00 to each of three San Francisco homicide inspectors defamed in a 1976 series of newspaper articles.

If all this makes libel law sound like an odd sort of board game with plenty of excitement but little predictability, consider some of the conclusions of the Iowa study to a different question: Why

do people sue? They do not sue, the study says, because they have suffered financial damage, but because they feel emotionally harmed by what was written about them. They do not sue because they wish to obtain large monetary awards, but because they wish "to restore their reputations or to punish the media."

Perspective on the foregoing observations is obtained by noting their relationship to the First Amendment. A basic contribution of the First Amendment is to establish truth by encouraging public controversy over opposing ideas. Today's libel law effectively fails to encourage - in fact it discourages - the exercise of the right of freedom of speech. It does so not only for the media but also for individual citizens.

Members of the media, as is well known, are discouraged by the risk of huge court judgments and the certainty of

ever-increasing defense fees (This aspect of the problems of the libel law has received public attention, for example, in the New York Times Magazine of September 29, 1985.)

Attention needs to be focused on an over-looked defect in the libel law which grievously inhibits freedom of speech for individuals. This defect can impose an injustice upon an individual who, having used freedom of speech to express controversial ideas, becomes a plaintiff in a libel suit against the media because of defamatory misrepresentations of his position. This injustice rests on the fact that, except for libel, the law provides that a plaintiff, exposed to imperilment caused by an action taken with actual malice, has his right in court to punish the offender and to be recompensed. Libel law unjustly requires - without exception - that the plaintiff

must prove actual damages and that public figures must meet the highest requirements for the proof.

This injustice of the libel law is clearly revealed by comparing the case of cne individual who did not suffer serious distress from the latest version of a number of libelous statements about him with the parallel case of another individual who has been imperiled by the latest of a a number of incidents in which bullets have come close to hitting him.

In both cases the latest incident may not have caused any significant increase in distress to the individual. Indeed, the latest incident may comfort him: an uninvited bullet, if the first to be available for ballistic study, would be welcome because it could contribute to a proof that actual malice caused his imperilment. Similarly, the latest

libelous statement would be comforting if it were the first to permit proof of actual malice. (In the Shockley case, the audio tapes of the interviews proved the actual malice of the reporter's article.) In both cases, a responsible imperiled individual would feel compelled, for many reasons, to expend the time and resources required to investigate the potential provided by the latest incident. These expenditures would be less harmful to him than the loss of self-esteem that would result from being irresponsible. Thus, both for the bullet case and for the libel case, justice demands that the Plaintiff of a libel suit should be recompensed, at a minimum, to cover reasonable expenditures for proving actual malice even when negligible personal distress has occurred.

It is evident that a wide range of

hypothetical, and probably actual, examples can readily be found in which a victim would be comforted by encountering an incident of an action taken with malicious intent against him. These would include damage to property, family relationships, etc. In all of these, the law would allow recompense to the victim at the expense of the offender who thus would be punished. In none of these would the plaintiff be required to prove personal damages to the same extreme degree as is required for libel, especially for the libel of public figures. The libel law makes no allowance for the possibility of the equivalent of a welcome, though uninvited, bullet. Libel law fails to provide for a uninvited, but welcome, occurrence of an outstandingly provable instance of libel with actual malice. Therein lies the injustice of the current

libel law and injustice which inhibits the freedom of speech of both private and public individuals.

The injustice of libel law is especially tragic for the nation because among public figures there is a substantial fraction of the most worthy contributors to the welfare of our nation. This injustice seriously inhibits these contributors from using their First Amendment rights of freedom of speech to express ideas that they feel important to disseminate because they distrust finding redress in court to rectify defamatory media distortions of their ideas.

It is of vital public interest that the fact be recognized that current libel law is unjust to those imperiled, but not necessarily damaged, by malicious libel and that this injustice should be rectified.

CONCLUSION

That the judgment of the Court of Appeals for the Eleventh Circuit should be reversed and a new trial ordered in this case.

Respectfully submitted,

_____
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CERTIFICATE OF SERVICE

I certify that I have this date forwarded a copy of the within and foregoing Petition for Writ of Certiorari by depositing said copy in the United States Mail in a properly addressed envelope with adequate postage thereon to the following address:

Albert G. Norman, Jr.
Attorney at Law
Thirty Third Floor First Atlanta Tower
Atlanta, GA 303833101

This _____ day of November, 1985.

_____
MURRAY M. SILVER, P.C.